United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6155

To Be Argued by:
STEVEN J. HYMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6155

B
P/S

KENNETH O. EKELUND,

Plaintiff-Appellant,

-against-

ELLIOT RICHARDSON, Secretary of Commerce of the United States, ROBERT J. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, ARTHUR B. ENGEL, Superintendent of the United States Merchant Marine Academy and THE UNITED STATES MERCHANT MARINE ACADEMY,

Defendants-Appellees.

BRIEF ON APPEAL

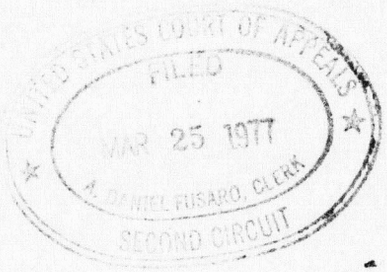

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Table of Cases

INDEX

ISSUES PRESENTED

1. Whether appellant is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures in his dormitory room at the United States Merchant Marine Academy, where local law enforcement officers initiate and conduct a search for contraband without a warrant, with the consent and cooperation of Academy officials.

2. Whether Academy regulations permitting inspection of cadets' personal effects in their dormitory rooms can justify a warrantless search initiated and conducted by local law enforcement officers, with the cooperation and permission of Academy officials, for the purpose of obtaining contraband to be used in a criminal prosecution.

3. Whether evidence seized as a result of a search by local law enforcement officials acting with the cooperation of Academy officials, which violated appellant's Fourth Amendment rights, may be introduced at a proceeding to dismiss appellant from the Academy.

4. Whether appellant was denied due process of law at the proceeding to dismiss him from the Academy when police reports were admitted into evidence but appellant was denied the opportunity to cross-examine the police officer.

Statement of the Case

Appellant has brought on this action to prevent his disenrollment from the United States Merchant Marine Academy. The summons and complaint were filed in June, 1976, with a request for preliminary injunctive relief.

A hearing on the preliminary injunction was held before the Hon. John F. Dooling, Jr., United States District Court Judge for the Eastern District of New York, on June 18, 21 and 22, 1976. Following the hearing, the Court rendered an opinion denying appellant's motion for preliminary injunctive relief (A. 3) and appellant was thereafter disenrolled from the United States Merchant Marine Academy.

Following the denial of preliminary injunctive relief, appellant timely filed this appeal.

Statement of the Facts

At the time of the events of this appeal, appellant was a midshipman in his senior year at the United States Merchant Marine Academy located in Great Neck, New York. As a result of the actions of respondents which form the subject matter of the legal action herein, appellant was disenrolled from the Academy just prior to his scheduled date of graduation. But for the charges herein, appellant was a cadet in good standing at the Academy.

The issues in the case herein revolve around a search of appellant's locked dormitory room by a local police officer in cooperation with the administration of the U.S. Merchant Marine Academy. As will be amplified below, the purpose of the search of appellant's room was to determine if he was in possession of marijuana and to effectuate his arrest and prosecution under state law, as a result of such possession. The search was conducted without a warrant and without the consent of the appellant who was neither consulted nor present at the time of the search.

As a result of the search and seizure of a quantity of marijuana in appellant's room, criminal charges were brought against him which were subsequently dismissed. Nevertheless, appellant was charged in an executive board proceeding with the very same charges and as a result of the evidence seized

at the time of the search and information obtained therefrom, was found guilty of possession of drugs and disenrolled from the Academy. Although the reports of the police officer were placed in evidence at the executive board hearing, appellant was not permitted to cross-examine the police officer who conducted the search at issue.

More specifically, the facts at issue are as follows:

A. Events Leading to the Search:

On February 20, 1976, a Kings Point police officer arrested two Merchant Marine cadets off post for possession of marijuana (T.117). */ One of the midshipmen, when questioned after his arrest, stated that he had obtained the marijuana from appellant. The police officer stated that he had no prior dealings with this cadet (T. 132). See, also, summary of reports of police officer at A. 31-37.

After arresting the two cadets, the police officer went to the Merchant Marine Academy and spoke to a Lt. Ford who is an officer there. He advised Lt. Ford that he had information that appellant was in possession of marijuana, although he did not divulge his source (T.165,232,234). According to the reports of the Merchant Marine Academy, the purpose of the patrolman's visit with Lt. Ford was to request "the U.S.

*/All "T" references are to the hearing Transcript.
All "A" references are to the Appendix.

Merchant Marine Academy's cooperation and authority to perform a search of Midshipman Ekelund's room and person" (A.22,24) Lt. Ford advised his superior of the statements made to him by the police officer and received permission to have the patrolman search appellant's room.

B. The Search

Without obtaining a warrant, and without further description or information from the police officer, Academy officials accompanied the police officer to appellant's room (T. 164). The door was locked and appellant was not present, nor was his roommate. Nevertheless the Academy officials opened the door with a passkey and escorted the patrolman in (T. 166) The patrolman then conducted a search of appellant's clothing, personal effects and of the furniture in the room (See, generally, T. 278 ff.). */ During the search, the Merchant Marine officials were present from time to time. They suggested places where the patrolman might look for contraband (T. 186 ff) The patrolman then located some marijuana in a pocket of a blazer belonging to appellant (T. 291) as well as his civilian gear drawer (T.293) and his desk. **/

*/ At the time that the patrolman commenced the search of appellant's room, an incident took place across the hall involving six midshipmen who apparently were having a party in their room. Appellant was not involved in this incident at all. The Court is respectfully referred to Judge Dooling's opinion in regard to the details of this incident, although it is submitted they are not relevant to the determination of the legal issues herein presented.

**/ The District Court Judge found that the involvement of the Academy in the search was limited to actions "to permit the search, to interpose no obstacle to it, and to assist in it" (A. 11).

Following the discovery of these items by the patrolman, appellant was summoned to his room and thereupon read his rights and placed under arrest (T. 74). He was then charged with possession of marijuana, a violation under the New York State Penal Law.

Appellant was thereupon arraigned in the local criminal court. A supporting deposition was furnished by Lt. Ford and filed with the court in support of the charges filed against appellant. Thereafter, however, all criminal charges against appellant were dismissed.

C. The Hearing

Notwithstanding dismissal of the criminal charges, appellant was charged by the Merchant Marine Academy with having violated its regulations (A.16,17). Specifically, appellant was charged with violation of 03107 (105) which provides that possession, sale or use of dangerous drugs is a Class I offense, and with violation of Regulation 02105.2 which provides, in substance, that a cadet who is found guilty of "illegal possession, use or transfer of any dangerous drug ... " will be subject to dismissal. In addition, he was also charged with violating Commandant's Instruction 02105.2A which provides for the policy and procedures of the Academy with regard to dangerous drugs. These regulations are set forth at A.42-47. The basis of these charges, as set forth in

the specification, was the discovery by the patrolman of marijuana during a search of appellant's room and personal effects.

Thereafter, appellant had a hearing pursuant to applicable Merchant Marine regulation, before an executive board. Introduced in evidence against him were the police reports which contained a diary of the events and the result of the police investigation (A. 31-37). In the reports, the police recounted what they allegedly obtained from a Cadet Byrne, including a statement that he had obtained marijuana from appellant (A. 33). In addition to these reports, also introduced in evidence at the executive board were the reports and investigations of the administration of the Merchant Marine Academy. Included among these reports was a recounting of what happened to appellant with regard to the police and the findings and conclusions of the police.

At the hearing appellant requested the opportunity to cross-examine the police officer who conducted the search and wrote the reports submitted in evidence (A. 4), but this request was denied. Appellant's counsel timely objected to the introduction of the police reports and the evidence that appellant possessed marijuana, but was overruled. In addition, appellant sought to have Cadet Byrne testify at the hearing on appellant's behalf, but Cadet Byrne pleaded the Fifth Amendment.*/ Appellant was thereafter found guilty (A. 18-20) and was ultimately disenrolled from the Academy and thereafter he brought on this action.

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*/ Throughout the hearing and at all times, appellant has maintained his innocence with regard to the alleged possession of marijuana.

Summary of Argument

Appellant is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures in his dormitory room when such searches are initiated and conducted by law enforcement officials without a warrant and with the intent to find contraband for use in a criminal prosecution. The failure of the police to seek a warrant or to otherwise obtain probable cause, renders the search defective under the Constitution. The District Court determination that police were excused from getting a warrant because of "exigent circumstances" and the "federal status of the place to be searched" (A. 10) is contrary to law.

The Academy regulations permitting inspection of cadets' personal effects and rooms does not justify a police search of appellant, where the intent of the search was to find contraband for use in a criminal prosecution. Once the matter became criminal in nature, the requirements of the Fourth Amendment had to be adhered to and the Academy and police could not use the ruse of health and welfare inspections as a basis for an intensive search of appellant's room.

Evidence seized as a result of a search by local law enforcement officials acting with the cooperation of the Academy, which violated appellant's Fourth Amendment rights, cannot be

introduced at a proceeding to dismiss appellant from the Academy. The dismissal regulations of the Academy involve severe sanctions which will result in a forfeiture of appellant's rights. Where the Academy has actively assisted in an illegal search, evidence thereby obtained should be excluded at the Academy proceeding.

Appellant was denied due process of law at the dismissal proceeding when police reports were placed in evidence at the hearing but appellant was denied the opportunity to cross-examine the police officer.. The action of the police in making reports available to the Academy but, at the same time, refusing to make the police officer involved in the incident available for questioning, required that the reports be excluded unless appellant was given a fair opportunity to confront the police officer and present his defense.

POINT I

THE POLICE SEARCH OF APPELLANT'S DORMITORY ROOM AT THE ACADEMY WITHOUT A WARRANT VIOLATED THE FOURTH AMENDMENT

The extensive police search of appellant's room and personal effects at the Merchant Marine Academy without a warrant violated appellant's Fourth Amendment rights to be free from unreasonable search and seizure. Under Katz v. United States, 389 U.S. 347 (1967), appellant had a reasonable expectation to privacy in his dormitory room to the extent that searches conducted by government or law enforcement officials seeking contraband for use in a criminal proceeding would be in conformity with the Fourth Amendment.

The failure of the police in the case at bar to obtain a warrant rendered the search defective and a per se violation of appellant's rights. Coolidge v. New Hampshire, 403 U.S. 443 (1970). The District Court's determination that there was probable cause to search appellant's room and that the police were excused from obtaining a warrant was erroneous. While the District Court sought to justify the legality of the warrantless search based upon (a) exigent circumstances; (b) federal status of the place to be searched, and (c) Academy regulations authorizing inspection, these rationales are insufficient to legalize the warrantless intrusive search of appellant's room and property.

A. The Fourth Amendment Applies to Dormitory Rooms at the Merchant Marine Academy.

Appellant is entitled to be free from unreasonable searches and seizures conducted by police officials while maintaining his home away from home in a dormitory room at the Merchant Marine Academy. As will be discussed below, the quasi-military status of the institution (see Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967)and O'Neill v. Dent, 364 F. Supp. 565 (E.D. N.Y. 1973)) does not vitiate appellant's right to Fourth Amendment protections of the private area of his room and the personal effects contained therein.

In a case strikingly similar to the one at bar, the Fifth Circuit determined that a student who occupies a college dormitory room enjoys the protection of the Fourth Amendment. Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971), and cases cited therein. In so holding, the Fifth Circuit found that a police search of a dormitory room without a warrant based upon information furnished the police was unreasonable under the Fourth Amendment. The fact that the school officials had authority to inspect the room to ensure conformity with applicable school regulations, did not remove the Fourth Amendment protections against the police search. The Fifth Circuit specifically extended the privacy doctrine enunciated in Katz to be applicable to a dormitory room at a state institution. Id. at p. 289.

Piazzola has recently been followed in another dormitory search case of Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975). The District Court in that case considered the issue and found that

"the plaintiff's dormitory room is his house and home for all practical purposes, and he has the same interest in the privacy of his room as any adult has in the privacy of his home, dwelling or lodging ... the plaintiff's interest in the privacy of his room is not at the 'outer limits' as the college argues, but on the contrary is at the very core of the Fourth Amendment protections." [footnote omitted] (at p. 786) Thus, in Smyth as in Piazolla, the Court found that warrantless police search of a dormitory room in search of drugs violated the Fourth Amendment. */ cf. Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976) and Collier v. Miller, 414 F. Supp. 1357 (S.D. Texas, 1976). See, also, Delgado, College Searches: Students' Privacy and the Fourth Amendment. 26 Hastings L.J. 57 (1974) "Searches by School Officials - Validity", 49 A.L.R. 3rd 978 ff.

As will be discussed in greater detail below, the existence of university regulations authorizing inspections by university personnel did not remove a student's expectation to privacy in the context of police searches. The Fourth Amendment protection afforded an individual is not lost because of residence in a university dormitory.

The quasi-military status with regard to the Merchant Marine Academy does not lessen appellant's Fourth Amendment rights nor make inapplicable to the case at bar the teachings of Piazolla and

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*/ In Piazolla and Smyth, the police were accompanied by college officials but in both instances the courts found the search to fall within the concept of a law enforcement operation.

Smyth. The rationale with regard to the expectation of privacy and the right to be free from warrantless and unreasonable searches remains applicable to appellant. It has long been recognized that the constitutional protections afforded our citizens applies to the military except where military necessity renders them inapplicable. See Burns v. Wilson, 346 U.S. 137 (1953); Parker v. Levy, 417 U.S. 733 (1974); United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967). See, also, O'Neill v. Dent, supra, at p.576.

In considering the application of the Fourth Amendment to military or quasi-military institutions it is important that we look to the United States Court of Military Appeals in the first instance for their expertise and guidance on the subject. See Schlessinger v Councilman, 420 U.S. 738 (1975) and Parker v. Levy, supra. The decisions of the Court of Military Appeals make it quite clear that the Fourth Amendment protections against warrantless searches applies with full vigor to military quarters when the purpose of the search is to locate contraband for use in a criminal proceeding. See United States v. Simmons, 22 USCMA 288, 46 CMR 288 (1973) and specifically fn. 10, at p. 292. In United States v. Lange, 15 USCMA 486, 35 CMR 458 (1965), the United States Court of Military Appeals held that the Fourth Amendment prohibition against unreasonable search and seizures applied to a military barracks. Since this case preceded Katz v. United States, supra, there is no discussion with the Court as to the extent to which a serviceman has a reasonable expectation of privacy in a barracks room, but the Court clearly found that a search of an individual's

personal effects in a barracks was governed by the Fourth Amendment. Recently, in United States v. Miller, 50 CMR 303 (ACMR 1975) aff'd 24 USCMA 192, 51 CMR 437 (1976), the Court of Military Appeals affirmed a lower court determination holding that a search of an airconditioning duct in a serviceman's room must meet Fourth Amendment requirements. As the lower court stated: "We view the duct to be an integral part of appellant's room and we believe appellant could reasonably expect freedom from intrusion into the duct through the room." 50 CMR, at p. 306. In fact, the Court of Military Appeals has had no difficulty in applying the general Fourth Amendment requirements to police-type searches. See United States v. Thomas, 24 USCMA 228, 51 CMR 607 (1976). See, also, United States v. Jordan, 24 USCMA 156, 50 CMR 664 (1976), where the Court has extended the Fourth Amendment protections to searches carried out by foreign officials against United States servicemen where there is some participation by American military officials.

Reliance by the District Court on Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) as sanctioning warrantless searches, as in the case at bar, is erroneous. The Committee for GI Rights was limited to a purely administrative-type inspection and did not involve a police search, as in the case at bar. Further, it has been noted by one judge of the United States Court of Military Appeals that "the efficacy of the Court of Appeals decision in Committee for GI Rights v. Callaway [cite omitted] is dubious at best, in light of the guidelines announced by the Supreme Court in

Schlessinger v. Councilman" [cite omitted]. United States v. Thomas, at p. 612, note 2. See, also, United States v. King, 24 USCMA 239, 51 CMR 607 (1976) where the Court of Military Appeals held that a health and welfare inspection did not permit intrusion into the person and clothing of a serviceman.

In view of the interpretation by the military as to the scope of Fourth Amendment rights accorded servicemen, it appears clear that appellant's dormitory room and personal effects therein come within the ambit of Fourth Amendment protection. Thus, cases such as Piazzola and Lange are in accord and a student's rights, either at a quasi-military institution or a university, are co-extensive where a police-type search is involved.

B. Regulations Authorizing Inspection do not Defeat Appellant's Fourth Amendment Rights

The District Court determination that the administrative inspection regulations authorized the police to search appellant's room, is contrary to law. (The applicable regulations are set forth at A. 42-47). Again, we must look to Piazzola and Lange as the guidelines for determining the impact of the right to inspect on the facts of the case at bar. In Piazzola, the University had inspection regulations similar to those in the case of the Merchant Marine Academy, yet the court found:

> "The regulation cannot be construed or applied so as to give consent to a search for evidence for the primary purpose of a criminal prosecution. [fn. omitted, citing Commonwealth v. McCloskey, 217 Pa. Super 432, 272 A.2d 271 (1970)] Other-

> wise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room. ... Clearly,the University had no authority to consent to [fn. omitted] or join in a police search for evidence of crime [fn. omitted]."
>
> (Piazzola v. Watkins, at pp. 289-290)

Smyth v. Lubbers, supra, is in accord with the rationale of Piazzola. As the District Court judge stated:

> "This case involves a full search which focused upon the room of a specific individual who was suspected of criminal activity and which aimed at discovering specific evidence. The search was not 'administrative' in the sense of a generalized or routine inspection for violations of housing, health or other regulatory code."
>
> (at p. 786)

See, also, Picha v. Wielgos, supra. In United States v. Lange, the Military Court of Appeals found that there was a significant distinction between search and inspection. The Court noted with approval, a lower court definition, as follows:

> "Comparing 'search' with 'inspection' we find that a search is made with a view toward discovering contraband or other evidence to be used in the prosecution of a criminal action. In other words, it is made in anticipation of prosecution. [fn. omitted] On the other hand, an inspection is an official examination to determine the fitness or readiness of the person, organization or equipment, and, though criminal proceedings may result from matters uncovered thereby, it is not made with a view to any criminal action."
>
> (supra, at p. 461)

See, also, United States v. Thomas, supra, and in particular,

ChiefJudge Fletcher's concurring opinion, at 51 CMR, p. 612.

Administrative inspections cannot be used as a basis for police searches unless the basic requirements of the Fourth Amendment are adhered to. The distinction between a health and welfare inspection and a search commenced at the request of police and conducted by police is of immense legal significance as cases such as Lange and Piazzola recognize. In the case at bar, we are clearly faced with a police search and not a health and welfare inspection. In fact, the District Court found the police to be the responsible agency which initiated and conducted the wide-ranging search of appellant's room and personal effects. In fact, the District Court noted:

> "The search was a search by a state law enforcement officer who took the marijuana into his possession for use in a criminal prosecution , which indeed, was promptly initiated. The role of the Academy and its officials was not to search and seize, or even to authorize the state law enforcement officer's search and seizure."
>
> (A. 12)

The case law makes it clear that the actions of the police official in searching appellant's room for contraband to be used in a criminal proceeding could not be sanctioned by a regulation authorizing inspection to insure conformity with regulations.*/

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*/ The inspection regulations cannot operate as a waiver of appellant's rights to be free from police searches. See Piazzola v. Watkins, supra; O'Neill v. Dent, supra.

In view of the above, it is submitted that appellant's room was clothed with the Fourth Amendment protection against unreasonable searches and seizures and that when the police officer entered the room by way of a passkey and commenced searching through appellant's belongings and personel effects he must have done so with a warrant or under recognized exceptions enunciated by the Supreme Court. See Coolidge v. New Hampshire, supra.

C. The Failure of the Police to Obtain a Warrant Rendered the Search of Appellant's Room Illegal.

The District Court seeks to justify the search of appellant's room by the police officer on the grounds that there was probable cause and that he was excused from obtaining a warrant because of "exigent circumstances" and the "federal status of the place to be searched". However, such rationales are not sufficient under the circumstances of the case at bar.

The Supreme Court has stated:

> "The 'most basic constitutional rule in this area is that "... searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative."' Coolidge v. New Hampshire, 403 U.S. 443 at 454-55 (1971)."

The government has failed to show that the exigencies of the situation in the case at bar necessitated a warrantless search.

Recently, Mr. Justice Powell noted that the rule today still remains that except in a "few carefully defined classes of cases" a warrantless search is unreasonable even if probable cause was determined to exist. See South Dakota v. Opperman, 49 L. Ed 2d 1000 (1976), Powell, J. concurring, at pp. 1012-1014. The facts of the case at bar do not fit within these few carefully defined classes of cases. See, also, United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973).

The Supreme Court in Warden v. Hayden, 387 U.S. 294 (1967) set down the basic requirements for the so-called "hot pursuit" or "exigent" circumstance exception to the requirement to obtain a warrant. Certainly in the facts of the case at bar there was ample opportunity to obtain a warrant, assuming there was probable cause. */ The fear that word would spread of the cadet's arrest is, it is submitted, too ephemeral a basis to forego the requirement for obtaining a warrant.

The rationale advanced by the District Court that a warrant was not required because of the "federal status" of the place to be searched is without logic. If it was determined that the state officials had no lawful authority to search the institution, then an application could have been made to a federal magistrate.

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*/ It is submitted that in fact there was not probable cause here since the informant was not known to be reliable by the police officers. See Aguilar v. Texas, 378 U.S. 108 (1964).

In fact, however, the state has ample authority to search the Academy, for state law provides that unless there is specific cessation of jurisdiction, the civil and criminal processes of the state will apply to federal property. See State Law, §50, et seq.

Most troublesome with regard to the District Court's decision is the acknowledgment by the Court that the search of appellant's room was lawful because "a magistrate, foreseeably, would hesitate or delay or might even refuse to issue a warrant." (A. 10). Such a contention is itself proof of why a warrant was necessary under the Fourth Amendment. In the case at bar it is submitted the magistrate would not have issued a warrant because there could have been no showing of probable cause. However, the failure to ask the magistrate was itself a violation of appellant's constitutional rights and rendered the search illegal and a nullity.

POINT II

THE ACADEMY MAY NOT USE THE INSPECTION REGULATIONS TO CIRCUMVENT APPELLANT'S FOURTH AMENDMENT RIGHTS WHERE THE PURPOSE OF THE SEARCH IS TO OBTAIN CONTRABAND FOR USE IN A CRIMINAL PROSECUTION

The Academy could not legitimatize the search of appellant's room by claiming that it had valid authority to conduct a search under the inspection regulations then in effect. The purpose of the search remained the same whether or not the search conducted was by a local officer or by an Academy official. Once it was established that appellant was believed to have violated the criminal laws of the State of New York and the purpose of the search was to locate contraband for use in a criminal prosecution, then the inspection regulations of the Academy were no longer applicable. Under such circumstances the Fourth Amendment requirements took precedence and there was an obligation upon the officials to obtain a warrant before proceeding further. Camara v. Municipal Court, 387 U.S. 523 (1967) and United States v. Lange, supra.

As discussed previously, inspection regulations both at the Academy and in the military, itself, are for the purpose of insuring fitness and the general health and welfare of the troop. As the Court of Military Appeals notes:

> "Generally the purpose of such a standby or 'shakedown' inspection would be 'for the health, welfare and morals of the individual and also to see that his belongings are clean, properly kept and maintained, uniforms are right, and if there is any property in his possession that does not belong there'. It would entail checking the billets and lockers and going through personal belongings."
>
> (United States v. Lange, supra, at p. 460.)

However, as the Lange court notes, an inspection ceases to be such when it is focused upon an individual in the search for contraband.

Under military case law the purpose for entering an individual's room determines whether or not that entry was in furtherance of inspection regulations or constituted a search under the Fourth Amendment. Where the entry "focused on the [individual] as a suspect and on a specific item of contraband in a specific place", such action constituted a search and not an inspection. United States v. Miller, supra, at p. 307. See, also, Moyer, Justice and the Military, Public Law Education Institute, §2-185 et seq. This purpose test is equally applicable to the facts in the case at bar and forms a meaningful distinction as to how the Academy may implement its inspection regulations. Under Miller and Lange, once appellant became a suspect and was being investigated for possession of criminal contraband, it was required that his Fourth Amendment rights be respected.

Both Piazzola v. Watkins, supra, and Smyth v. Lubbers, supra, recognize the military distinction set forth above. The regulations in each of those cases were held insufficient under the Fourth Amendment to permit a warrantless search the purpose of which was to find contraband for use in a criminal proceeding.

In the case at bar, the search was not a health and welfare inspection but clearly an effort to obtain contraband to

be used in a criminal prosecution. Under such circumstances once the Academy determined to permit a police search, it could no longer rely on inspection regulations as the means of gaining entry into appellant's room but rather, had the same limitation as any other government institution to act within the confines of the Fourth Amendment. It could not "cooperate" with the police and thereby bifurcate the search into separate elements, that is, the police search being conducted by policy officials acting under one set of rules and an inspection being conducted by the Academy acting under another set of rules. The purpose of the search is what determines the rules by which it is to be conducted. See United States v. Lange, Piazzola v. Watkins, both supra, and Smyth v. Lubbers, supra. See, also, the discussion in United States v. Roberts, 50 CMR 699 (ACM 1975). Compare with Moore v. Student Affairs Committee, 284 F. Supp. 725 (M.D. Alabama, 1968). It is also to be noted that it cannot be argued that the Academy had sufficient probable cause on its own to enter appellant's room. Where the purpose of the search is directed against an individual to obtain evidence to be used in a criminal prosecution, the Academy is not excused from obtaining a warrant. There is no basis for the Academy in such a situation to be an exception to the rules set down by the Supreme Court in Camara v. Municipal Court, supra. Where criminal activity is suspected of having taken place, the Academy has no greater authority than a law enforcement officer to search appellant's room and personal effects.

POINT III

THE EVIDENCE OBTAINED DURING AN ILLEGAL SEARCH OF APPELLANT'S ROOM MUST BE EXCLUDED FROM AN ACADEMY DISENROLLMENT PROCEEDING

Where appellant's room is the subject of an unlawful search which was conducted by the police with Academy cooperation and approval, the evidence obtained therefrom by the police and turned over to the Academy should not be permitted to be introduced in a disenrollment proceeding seeking appellant's ouster on grounds of having violated state law.

Exclusion of evidence seized during the search from the administrative hearing is required because (a) the Academy was not a mere recipient of illegally seized evidence but was, in fact, a participant in it; (see United States v. Janis, 49 L. Ed 2d 1046 and United States v. Jordan, supra);(b) the disenrollment proceedings against appellant are in the nature of a forfeiture proceeding to the extent that it involves a "harsh" and "severe" remedy; (Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972) and Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975)); and (c) the disenrollment proceeding was predicated upon violation of state and federal criminal laws. (One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Smyth v. Lubbers, supra, at pp.786-787.

The question of Academy participation in the search is beyond dispute. While the District Court holds the search to be a police search, it acknowledged that the Academy consented to and assisted in the search. Academy officials took the police officer to appellant's room, opened the door with a pass-key and helped to point out to the police officer places that should be looked into. Such activity constitutes a meaningful participation in the search. (See, for example, United States v. Jordan, supra.) In United States v. Janis, Mr. Justice Blackmun discussed the application of the exclusionary rule to civil proceedings. 49 L. Ed 2d, at pp. 1061-64. He noted that the critical distinction between those cases which recognized the exclusionary rule to be applicable to civil proceedings and the facts in Janis was that the officer committing the illegal search was not an agent of the sovereign that sought to use the evidence nor a participant in the illegal search. Id., at p. 1061-62. In fact, Mr. Justice Blackmun noted that participation by the receiving sovereign in the search would be a different matter than that presented in Janis. (See fn. 31, at p. 1061). See, also, Byers v. United States, 273 U.S. 28 and Lustig v. United States, 338 U.S. 74.

The participation by the Academy in this case in the search brings it within the line of cases that have recognized

the application of the exclusionary rule to civil proceedings. United States v. Janis, at p. 1061, and see fn. 30.

Since the Academy participated in the search, the exclusionary rule is applicable to both its use of the evidence as well as the police use of the evidence. The Academy should not be able to gain from its wrongdoing and, as with the police, can only be deterred from future infringements by banning the use in its disciplinary proceedings of evidence it obtained illegally.

The disenrollment proceeding commenced against appellant carries with it a sufficiently severe penalty and is so intertwined with violation of local and federal criminal laws that the proceeding may be characterized as a quasi-criminal or forfeiture action. See One 1958 Plymouth Sedan, supra, and cases cited by Mr. Justice Blackmun in United States v. Janis, supra, fn. 30, at p. 1061. See, also, Smyth v. Lubbers, supra, at p. 787.

The regulations in the case at bar under which appellant has been charged are intertwined with the Criminal Law of the State of New York (See A. 42-47). In fact, at the executive board proceeding part of the evidence considered by the board in dismissing appellant from the Academy was the Criminal Law of the State of New York which was attached to the findings of the board as an exhibit. (See List of Enclosures to Executive Board Findings, at A. 21a). Thus, as in the One 1958 Plymouth Sedan case, the proceedings in Criminal Court and before the

Academy, while technically independent were, nevertheless, interrelated. The Academy cooperated with the police and one of the Academy officials signed a deposition to initiate the criminal charge (See A. 39), and the police cooperated with the Academy by making police reports and lab reports available for use in the administrative proceeding (See A. 31-37,41). Thus it is clear that the proceedings were not so independent as to warrant different treatment of the evidence obtained.

It is to be noted that the disenrollment proceedings brought against appellant are somewhat different than those in Hagopian v. Knowlton, supra, Andrews v. Knowlton, supra, and Wasson v. Trowbridge, supra. In each of those cases the charges involved excessive demerits or violations of honor codes or school regulation. The underlying charges in those cases were in no way predicated upon state or federal criminal law as they are in the case at bar. This distinction is significant. Once the issue involves evidence seized by law enforcement officers and findings based upon alleged criminal activity, the nature of the hearing changes and the issues presented go beyond mere enforcement of Academy regulations.

The evidence obtained by the Academy from the police, namely, the lab report defining the substance seized in appellant's room, and the police reports and all evidence derived therefrom,

having been illegally obtained, should have been excluded from evidence at the executive board proceedings at the Academy.

POINT IV.

APPELLANT WAS DENIED DUE PROCESS OF LAW AT THE EXECUTIVE BOARD HEARING

Appellant was denied due process of law when the Academy introduced into evidence against him at the executive board proceeding reports and statements made available to the Academy by the police, but because of the police refusal to appear at the proceeding was not given adequate opportunity to cross-examine or present his defense. The police reports in evidence were critical to the case against appellant, yet he had no opportunity to confront the officer or otherwise cross-examine him because of his refusal to appear. Under such circumstances due process requires that the evidence obtained from the officer not be used in the executive board proceeding.

Under Hagopian and Wasson, appellant is entitled to "a hearing with full procedural safeguards" (see Hagopian, supra, at p. 907) which includes "adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence." Id, p.905. See, also, Wasson v. Trowbridge, supra. Appellant did not have a fair hearing when evidence obtained by police and their reports were used against him without the officer being present.

While the Academy does not have the power to subpoena, it is clear that the police and the Academy were working in a cooperative fashion and the Academy could have made a formal request for the appearance of the officer. Instead, the record seems to reflect a refusal by the police to appear for reasons not entirely clear, although it was indicated by Chief Hartz that the police officer was not available on the date of the hearing because it was his day off (see A. 40). If the reason was merely one of convenience for the police officer's non-appearance, then the hearing should have been adjourned. If the reason was one of refusal by the police to appear, then the evidence obtained from him should not have been introduced.

It was highly unfair and prejudicial to appellant for the police to unilaterally limit the extent to which they would cooperate with the Academy. If the police believed they had the responsibility to cooperate, then they should have done so in a manner consistent with appellant's rights. They should not have been able to submit enough evidence to warrant appellant's dismissal but not be available for appellant to defend himself. While the Academy was not in a position to enforce such fair play, it had available the other reaonable alternative of excluding from evidence that which it received from the police. This it did not do and plaintiff was prejudiced thereby.

Conclusion

WHEREFORE, for the reasons set forth above, the order of the District Court should be in all respects reversed.

Respectfully submitted,

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CERTIFICATION

On March 25, 1977, I, the undersigned, mailed to the United States Attorneys Office for the Eastern District of New York, to the attention of Constance Vecellio, Esq., Assistant U.S. Attorney, at the United States Court House, 225 Cadman Plaza East, Brooklyn, N.Y., two copies of the within Brief and Appendix. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are wilfully false I am subject to punishment.

Selma Trauber

Selma Trauber

Dated: March 25, 1977